

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CA-01797-COA

IN THE INTEREST OF K. G., A MINOR

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| DATE OF JUDGMENT: | 7/27/2004 |
| TRIAL JUDGE: | HON. JAMES ROBERT GILFOY, IV |
| COURT FROM WHICH APPEALED: | HOLMES COUNTY YOUTH COURT |
| ATTORNEY FOR APPELLANT: | JENNIFER ALICIA COLLINS |
| ATTORNEY FOR APPELLEE: | JOHN M. GILMORE |
| NATURE OF THE CASE: | CIVIL - JUVENILE JUSTICE |
| TRIAL COURT DISPOSITION: | MINOR CHILD FOUND TO BE A DELINQUENT CHILD AND COMMITTED TO TRAINING SCHOOL. |
| DISPOSITION: | AFFIRMED-06/05/2007 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

EN BANC.

ISHEE, J., FOR THE COURT:

¶1. On July 27, 2004, K. G. was adjudicated in the Youth Court of Holmes County to be a delinquent child. K. G. was committed to the Columbia Training School and was placed on probation until her eighteenth birthday. Aggrieved by the court's decision, K. G. appeals. She asserts the following issues for this Court's review:

- I. Whether the court erred in adjudicating the minor, K. G., as a delinquent child.
- II. Whether the court erred by proceeding with the dispositional hearing and committing the child to the training school by failing to comply with the specific requirements of the law.
- III. Whether the minor received effective assistance of counsel.
- IV. Whether the case at bar is ripe for adjudication.

Finding no error, we affirm.

FACTS

¶2. On July 20, 2004, the Holmes County Youth Court prosecutor filed a petition in the Chancery Court of Holmes County asserting that, on April 13, 2004, K. G., a female minor child born on August 19, 1990, committed a simple assault against Jean A. Anderson, a teacher at Williams-Sullivan School, by pushing a desk in front of Anderson, causing her to fall and to injure her knee and back. On July 27, 2004, a hearing was held in the Youth Court of Holmes County to determine whether K. G.'s actions constituted a delinquent act. Robert G. Clark was appointed as counsel and represented K. G. during the hearing.

¶3. Anderson testified that, on April 13, 2004, K. G. disrupted the class by turning over a granite top desk, which made a very loud noise. Consequently, Anderson walked toward the front of the classroom in order to press the "call light" to call the principal. Anderson testified that, as she walked by K. G., K. G. pushed the desk in front of Anderson, in an effort to prevent her from pressing the call light, which caused Anderson to fall "real hard" on the floor.

¶4. On cross-examination, Anderson testified that after pushing the desk in front of her, K. G. did not apologize and acted as if nothing had happened. Anderson further testified that K. G. was suspended for three-days and given fifteen days at an alternative school as a result of the desk-pushing incident. Anderson also testified that during the first nine weeks of school K. G. had a grade point average of ninety-two, but that during the second nine weeks her grade point average dropped to sixty because she was not participating in class.

¶5. K. G.'s mother, Z. G., testified that K. G. was diagnosed with attention deficit disorder and had been on medication for the disorder for approximately five years. Z. G. further testified that K.G. visited a social worker once a month for approximately four or five years, and that during those

visits she received psychological evaluations. Z. G. also testified that K. G. had been seeing a psychiatrist for a year and a half.

¶6. At the conclusion of the aforementioned testimony, the court found that the child's therapy and medications were obviously not working because she assaulted a teacher. The court further determined that K. G.'s actions were a clear violation of the law and were consequently delinquent. Nonetheless, the court asked K. G.'s counsel whether he wanted K. G. to testify, and K. G.'s counsel subsequently called her to the stand.

¶7. When asked why she pushed the desk in front of Anderson, K. G. replied that she just did it. She further testified that she did not need to go anywhere and that she would act differently in the future. K. G. also requested that she be put on probation.

¶8. In its ruling from the bench, the court ordered K.G. to be committed to the Columbia Training School and, upon her release, be placed on probation until her eighteenth birthday. The court further ordered that the training school provide psychological evaluation and treatment for K.G. On July 28, 2004, the court entered an order memorializing the bench ruling.

ISSUES AND ANALYSIS

- I. Whether the court erred in adjudicating the minor, K. G., as a delinquent child.**
- II. Whether the court erred by proceeding with the dispositional hearing and committing the child to the training school by failing to comply with the specific requirements of the law.**

¶9. Under these two assignments of error, K. G. asserts that the court below failed to follow the provisions of Mississippi Code Annotated section 43-21-557 (Supp. 2006), which provides in part that:

(1) At the beginning of each adjudicatory hearing, the youth court shall:

(a) verify the name, age and residence of the child who is the subject of the cause and ascertain the relationship of the parties, each to the other;

(b) ascertain whether all necessary parties are present and identify all persons participating in the hearing;

(c) ascertain whether the notice requirements have been complied with and, if not, whether the affected parties intelligently waived compliance in accordance with Section 43-21-507.

Mississippi Code Annotated section 43-21-557 also mandates that, at the beginning of each adjudicatory hearing, the youth court must inform the parties of the purpose of the hearing, the possible dispositions that may result, and that they have the right to counsel, the right to remain silent, the right to subpoena witnesses, the right to cross-examine adverse witnesses, as well as the right to appeal. Miss. Code Ann. § 43-21-557(1)(d)(e).

¶10. The adjudicatory hearing in the case sub judice began as follows:

THE COURT: Cause No. 26YCO4 D0072 0099, the child, [K. G.] is here with her mother [Z. G.]; is that correct, Z. G.?

MS. COLLINS: Yes.

THE COURT: Also present is Ms. Jean A. Anderson, the alleged victim in this matter. Raise your hands to be sworn, please.

(Witnesses sworn.)

Go ahead, Mr. Gilmore.

Thus, the record reveals that the youth court failed to inform the parties of the purpose of the hearing and the possible dispositions that may result. The youth court further failed to inform K. G. that she had the following rights: the right to counsel, the right to remain silent, the right to subpoena witnesses, the right to cross-examine adverse witnesses, and the right to appeal.

¶11. The facts in the case sub judice are similar to those in *In the Interest of L. C. A.*, 938 So. 2d 300 (Miss. Ct. App. 2006). In *L. C. A.*, we held that, although the youth court failed to fully explain to the juvenile his rights, pursuant to Mississippi Code Annotated section 43-21-557, the youth court's error was harmless because he was adequately represented by appointed counsel. *Id.* at 306

(¶18). In finding harmless error, we noted that the juvenile’s counsel cross-examined witnesses and called witnesses on behalf of the juvenile. *Id.* We further noted that the juvenile’s counsel did not complain at the adjudicatory hearing that the youth court failed to comply with Mississippi Code Annotated section 43-21-557. *Id.*

¶12. As in *L. C. A.*, K. G. was represented at the adjudicatory hearing by her appointed counsel, Clark, who cross-examined Anderson. Clark also called Z. G. and K. G. to testify. The record further reveals that Z. G. and K. G. were served with a summons informing them that K. G. was being charged with the simple assault of Anderson. The summons also informed them that K.G. had the right to be represented by counsel and to subpoena witnesses. Moreover, even though the youth court clearly failed to follow the mandates of Mississippi Code Annotated section 43-21-557, K. G. has failed to demonstrate any resulting prejudice or unfairness in the proceeding. Consequently, although we find that the youth court erred in not following statutory procedure, we also find that this error was harmless.

¶13. Under this assignment of error, K. G. also asserts that the youth court erred in its failure to established beyond a reasonable doubt that K. G. committed a delinquent act. We disagree. Mississippi Code Annotated section 97-3-7(1) (Rev. 2006) provides that “[a] person is guilty of simple assault if he . . . attempts to cause or purposely, knowingly or recklessly causes bodily injury to another.” Mississippi Code Annotated section 43-21-105(j) (Supp. 2006) defines a “delinquent act” as “any act, which if committed by an adult, is designated as a crime under state or federal law, or municipal or county ordinance other than offenses punishable by life imprisonment or death.” During her testimony at the adjudicatory hearing, K. G. admitted that she pushed the desk in front of Anderson. K. G. never claimed that her actions were accidents or that she did not mean to injure Anderson. When asked why she committed the act, K. G. explained that she just did it. Given

K.G.'s own admission, we find no merit to K. G.'s claim that her delinquency was not established beyond a reasonable doubt. This issue is without merit.

¶14. K. G. also asserts that the youth court erred by failing to consider factors set forth in Mississippi Code Annotated section 43-21-603(3)(a) (Supp. 2006). We disagree. Mississippi Code Annotated section 43-21-603(3) provides the following:

(3) If the child has been adjudicated a delinquent child, before entering a disposition order, the youth court should consider, among others, the following relevant factors:

- (a) The nature of the offense;
- (b) The manner in which the offense was committed;
- (c) The nature and number of a child's prior adjudicated offenses;
- (d) The child's need for care and assistance;
- (e) The child's current medical history, including medication and diagnosis;
- (f) The child's mental health history, which may include, but not be limited to, the Massachusetts Youth Screening Instrument version 2 (MAYSI-2);
- (g) Copies of the child's cumulative record from the last school of record, including special education records, if applicable;
- (h) Recommendation from the school of record based on areas of remediation needed;
- (i) Disciplinary records from the school of record; and
- (j) Records of disciplinary actions outside of the school setting.

¶15. The court considered the testimony of Anderson concerning the incident and Z.G. concerning K.G.'s medical history and prior offenses. Based upon that testimony, the court determined that the child's therapy and medications were not working because she assaulted a teacher. The court further determined that K. G.'s actions were a clear violation of the law and were consequently delinquent. We find no merit to K. G.'s claim that the youth court erred in failing to follow Mississippi Code Annotated section 43-21-603(3)(a). This issue is without merit.

III. Whether the minor received effective assistance of counsel.

¶16. The standard of review for a claim of ineffective assistance of counsel was set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To bring a successful claim for ineffective assistance of counsel, pursuant to the court’s ruling in *Strickland*, the defendant must prove that his attorney’s overall performance was deficient and that this deficiency deprived him of a fair trial. *Id.* at 689; *Moore v. State*, 676 So. 2d 244, 246 (Miss. 1996) (citing *Perkins v. State*, 487 So. 2d 791, 793 (Miss. 1986)). We must be mindful of the “strong but rebuttable presumption that an attorney’s performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic.” *Covington v. State*, 909 So. 2d 160, 162 (¶4) (Miss. Ct. App. 2005) (quoting *Stevenson v. State*, 798 So. 2d 599, 602 (¶6) (Miss. Ct. App. 2001)). To overcome this presumption, the defendant must demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Woodson v. State*, 845 So. 2d 740, 742 (¶9) (Miss. Ct. App. 2003).

¶17. K. G. asserts that she received ineffective assistance of counsel because Clark did not file any pretrial motions, or subpoena witnesses, or compel or exclude production of evidence. Nevertheless, K. G. fails to establish that the result of the proceeding would have been different had Clark filed any pretrial motions, subpoenaed witnesses, or compelled or excluded the production of evidence. The record shows that Clark cross-examined Anderson and that he called Z. G. and K. G. to testify. We find that K. G. has failed to overcome the rebuttable presumption that an attorney’s performance falls within a wide range of reasonable professional assistance. *Covington*, 909 So. 2d at 162. This issue is without merit.

IV. Whether the case at bar is ripe for adjudication.

¶18. Under this assignment of error, K. G. actually addresses the doctrine of mootness, rather than the doctrine of ripeness. Nonetheless, we decline to address this issue, as we have already addressed K. G.'s other claims on the merits.

¶19. THE JUDGMENT OF THE YOUTH COURT OF HOLMES COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HOLMES COUNTY.

LEE AND MYERS, P.JJ., GRIFFIS, BARNES, ROBERTS AND CARLTON, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J. AND CHANDLER, J.

IRVING, J., DISSENTING:

¶20. The majority finds no infirmity in the proceedings below and affirms the trial court's finding of delinquency and commitment of K.G. to Columbia Training School. I cannot agree. The record in this case reveals, without a doubt, that K.G. did not get a fair and impartial hearing, and that the trial judge did not follow the mandatory statutory procedural safeguards before commencing the adjudicatory and dispositional hearings which resulted in K.G. being sentenced to the training school. Therefore, I dissent.

¶21. I will first discuss the statutory procedural guidelines for both the adjudicatory and dispositional hearings, which the youth court trial judge failed to follow. Then I will discuss the evidence and the trial judge's predetermined disposition, which I believe require that the adjudication of delinquency be reversed and remanded.

¶22. The majority acknowledges that the trial judge failed to follow the order of proceedings for adjudicatory hearings as mandated by Mississippi Code Annotated section 43-21-557 (Rev. 2004).¹

¹ This section reads in pertinent part as follows:

- (1) At the beginning of each adjudicatory hearing, the youth court shall:
 - (a) verify the name, age and residence of the child who is the subject of the cause and ascertain the relationship of the parties, each to the other;
 - (b) ascertain whether all necessary parties are present and

Nevertheless, relying on this Court's decision in *In re L.C.A.*, 938 So. 2d 300 (Miss. Ct. App. 2006), the majority finds that this failure constitutes harmless error.

¶23. In *In re L.C.A.*, this Court, relying upon *In re T.L.C.*, 566 So. 2d 691 (Miss. 1990), did not specifically find that the youth court failed to follow the requirements of section 43-21-557. We found, however, that if any error occurred with respect to the procedure employed, it was harmless, as the youthful defendant was ably represented by a court-appointed public defender who did not complain about the youth court's failure to follow the procedure dictated by section 43-21-557. *In re L.C.A.*, 938 So. 2d at 306 (¶¶18-19).

¶24. I dissented in *In re L.C.A.* and distinguished *In re T.L.C.* I will not repeat that discussion here except to say that, unlike *In re T.L.C.*, this case involves a finding of delinquency, and I know of no Mississippi Supreme Court precedent holding that in delinquency adjudications, it is harmless error not to follow the procedural requirements of section 43-21-557. As the majority notes, the trial judge did not follow the procedural requirements of section 43-21-557, in that the trial judge failed to inform K.G. of certain basic constitutional rights. To be clear, the record reflects that the trial judge did not explain to K.G. or her mother any dispositional alternatives or the rights specified in section 43-21-557. The trial judge began the adjudicatory hearing after only ascertaining the

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- identify all persons participating in the hearing;
 - (c) ascertain whether the notice requirements have been complied with and, if not, whether the affected parties intelligently waived compliance in accordance with Section 43-21-507;
 - (d) explain to the parties the purpose of the hearing and the possible dispositional alternatives thereof; and
 - (e) explain to the parties:
 - (i) the right to counsel;
 - (ii) the right to remain silent;
 - (iii) the right to subpoena witnesses;
 - (iv) the right to cross-examine witnesses testifying against him; and
 - (v) the right to appeal.

presence of K.G., her mother, and the victim. This is wholly unacceptable. Surely, the legislature intended to afford certain rights and safeguards to youthful defendants, such as are set forth in section 43-21-557. I will not lend my voice or authority of office to judicially annihilate what the legislature, in its wisdom and thoughtful deliberations, determined should take place in our youth courts before a youthful defendant is adjudicated a delinquent and incarcerated in one of our training schools.

¶25. I now turn to a discussion of the evidence adduced during the adjudicatory phase of the proceedings. During this phase, the State offered only one witness, the teacher victim. Immediately after the victim related, during direct examination, her story as to what happened, the trial judge interrupted the proceedings:

THE COURT: I've heard enough to find that this child is a delinquent child in this. By further examination on Mr. Clark's part that it could be offset [sic]. You can tender this witness for cross-examination at this point. You may proceed, Mr. Clark.

MR. CLARK: I would like to call Ms. - -

THE COURT: You can cross-examine her if you like. I'm not saying that you have to, but you can start right now with cross-examination to offset my findings of delinquency at this point unless it is offset.

Before the court's interruption, the victim had testified that K.G. turned over a desk-chair and pushed it toward her, causing her to trip and fall sideways onto the floor. During cross-examination, the victim acknowledged that she did not know if K.G. was trying to trip her, but thought that K.G. was certainly trying to prevent her from calling anyone to report what K.G. had done.

¶26. Upon the conclusion of the adjudicatory hearing, the trial judge immediately commenced the dispositional hearing without first informing the parties of the purpose of the hearing as mandated by section 43-21-603 (Rev. 2004).² But more importantly, the trial judge entered the disposition

²(1) At the beginning of each disposition hearing, the judge shall inform the parties of the purpose of the hearing.

order without first considering the factors specified in subsection (3) of section 43-21-603. Had the trial judge thoughtfully considered the referenced factors, it would seem rather improbable that he could arrive at the disposition that he did.

¶27. In support of this point, and to give a clear picture of K.G.'s situation, I set forth in great detail the testimony given during the dispositional hearing, starting with K.G.'s mother:

Q. Ms. Z.G., you have heard the testimony here today, do you believe that it's in the best interest of your daughter for her to go to training school?

A. No.

Q. You've heard the testimony of [the victim] when she stated that she is very disrespectful of you. Do you have any problems with your daughter at home?

A. No.

Q. Have [sic] your daughter been diagnosed with a medical condition?

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- (2) All testimony shall be under oath unless waived by all parties and may be in narrative form. The court may consider any evidence that is material and relevant to the disposition of the cause, including hearsay and opinion evidence. At the conclusion of the evidence, the youth court shall give the parties an opportunity to present oral argument.
- (3) If the child has been adjudicated a delinquent child, before entering a disposition order, the youth court should consider, among others, the following relevant factors:
- (a) The nature of the offense;
 - (b) The manner in which the offense was committed;
 - (c) The nature and number of a child's prior adjudicated offenses;
 - (d) The child's need for care and assistance;
 - (e) The child's current medical history, including medication and diagnosis;
 - (f) The child's mental health history, which may include, but not be limited to, the Massachusetts Youth Screening Instrument version 2 (MAYSI-2);
 - (g) The child's cumulative record from the last school of record, including special education records, if applicable;
 - (h) Recommendation from the school of record based on areas of remediation needed;
 - (i) Disciplinary records from the school of record; and
 - (j) Records of disciplinary actions outside of the school setting.

A. Yes.

Q. What medical conditions have [sic] she been diagnosed with?

A. Attention Deficit Disorder. She was put on medication for about five years or more.

Q. She's been on - -

A. She's had counseling. She's seeing a psychiatrist - -

Q. Psychiatrist and a psychologist?

A. Yes. Every month - -

THE COURT: Every once in a while - -

THE WITNESS: No, I said every month we go to Ridgeland to their clinic, and visit the social worker. Then this two for one help is working with her and my son. And one was just at the house yesterday, a social worker came by to see me.

THE COURT: How long has she been having that psychological evaluation help that you've talking about? How long has that been going on?

THE WITNESS: At least four or five years.

THE COURT: Okay. That's not cutting the mustard. Four or five years, and she still throws a desk -- or pushes a desk on the teacher and injured the teacher. Her acute attitude at the school -- She's not getting the help that she needs where she is now. It's not working.

THE WITNESS: She didn't take her medication that day - -

THE COURT: It's not working. So what else. Mr. Clark?

BY MR. CLARK: (Attorney for defendant)

Q. Ms. Z.G., on this day, she had been prescribed medication, right? And was she on medication for the time that this incident took place?

A. Yes, but I also had someone to stay with her. My husband had a stroke and I was at the hospital with him, and I had someone watching her that day.

Most of the time. She had been staying with family members, because my husband had a stroke at the time of this.

Q. So, it is possible that during this time this incident happened, she was not taking her medication because of the fact that your husband was ill and you weren't there to make sure those medications were taken?

A. When she takes this medicine, she's a better person. She's more controlled. And I must say, the only reason she was outside the class was because she was able - - I asked [the victim] was she able to keep up or did she want her back in the class, and [the victim] agreed that she didn't want her back in the classroom. They wouldn't put her back in there.

Q. On which occasion are we talking about?

A. After - -

Q. After this incident?

A. Uh-huh. (Affirmative response.)

Q. Did she go back to [the victim's] class after this incident?

A. No.

MS. HUNTER:³ What is the reason for the (inaudible) teacher support the counselors there on hand.

A. Ms. Leach is the counselor, and Ms. (inaudible.)

MS. HUNTER: (Inaudible.)

A. And it's one more that works there. She was like (inaudible.)

MS. HUNTER: Were they doing a lot of interventions at the school?

A. Yes, and coming to my house.

THE COURT: How long have they been intervening at the school on the child with psychiatric help?

A. They had just come in.

THE COURT: What period of time?

³ Ms. Hunter is the Youth Court Services Counselor.

A. It just started in August. He was brought in, and the lady that was there before Ms. Leach was Ms. (Inaudible) And she just came in, you know, last - the second semester I think when she came and started these treatments (Inaudible.) But she's not there and Ms. Leach just took over.

THE COURT: Who?

A. Ms. Leach. She just took over about April.

THE COURT: What's her private title? What's her credentials? Ms. Leach, what is she a psychiatrist?

A. She a [sic] social worker.

THE COURT: She's a what?

A. A social worker.

THE COURT: Social worker. Is she a psychiatrist?

A. She's a - -

THE COURT: Who is the psychiatrist that's working with this child right now?

A.. Dr. Gutlett. He's from Ridgeland Clinic.

THE COURT: And how long has he been working with your child?

A. About a - - almost a year and a half.

THE COURT: See, that's not getting it for some reason. I'm looking at this - - I'll look at an alternative to training school provided it's a deep psychiatric care if that's what she needs, but if it's just an old attitude problem, then that can be dealt with by going to training school.

BY MR. CLARK:

Q. Ms. Z.G., has K.G. ever been before the Youth Court prior to this incident?

A. No.

Q. So this is the first time she's ever been before Youth Court?

A. Yes.

MR. CLARK: May it please the Court, on behalf of Ms. K.G., I'm going to recommend probation. This is the first incident that she has had before the Youth Court, and we should defer to restricted means in terms of correcting behavior of other youth and probation should be given a chance to correct that probation with the continued psychological work, she should be given a chance being on probation and correcting her behavior with her knowing that she's on probation.

MR. GILMORE: We had her brother in here, I think what two weeks ago or what?

MS. HUNTER: About two weeks ago.

MR. GILMORE: And we put him on those guidelines and was supposed to report back in two months.

MS. HUNTER: Yes.

MR. GILMORE: (Inaudible.)

MR. CLARK: (Inaudible.)

MS. HUNTER: (Inaudible.)

THE COURT: If y'all don't have anything else, then let me make a ruling.

MR. GILMORE: He did appear to have a problem, but now he's going to the same people that she's describe [sic] that she's going to now. I don't know whether it's - -

THE COURT: Well, I'm not having any confidence in what they're doing. I'm not faulting them. What I'm saying is what she's been going through is not working - - If it is, then she wouldn't have assaulted this teacher. She assaulted that teacher right there. That desk didn't just jump up and run over there and this lady's way, when all she's trying to do is to chair her class and fulfill her responsibilities. She ought not have to open her mouth with nothing but sit down, be quiet, I'm going to go hit this button for somebody to come down there and help me. And anything that they take beyond that is clear violation of the law, and it's a clear delinquency; and it's as clear (inaudible).

So, I'm going to go ahead with the Order of the Court being that - - Did you want her to testify for any reason? I'll reopen that so I can - - I'm just asking the question now.

MR. CLARK: I - -

THE COURT: I'm not saying she should. I'm just asking the question.

MR. CLARK: (Inaudible.)

[THE VICTIM]: I would like to know why K.G. acts like that with me?

THE COURT: Well, I don't know that I know, but I know it happened, ma'am, and so - - What do you want?

¶28. It seems rather obvious from the extensive colloquy between the trial court and K.G.'s mother that the trial judge had already made up his mind that the only disposition was confinement in the training school. Further, it is strikingly obvious that the trial judge did not consider any of the factors set forth in section 43-21-603, subsection (3). For these reasons, I dissent. I would reverse and remand this case for further proceedings consistent with the statutory procedural requirements and guidelines set forth in sections 43-21-557 and 43-21-603.

KING, C.J., AND CHANDLER, J., JOIN THIS SEPARATE WRITTEN OPINION.